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HEALTHCARE

ADR MONITOR

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Three States Consider Arbitration For Managed Care Payment Disputes

On January 12, 2006, New Jersey Governor Richard Codey signed the Health Claims Authorization, Processing and Payment Act (SB 2824), requiring the state's health insurers and healthcare providers to arbitrate health payment disputes, into law.

In addition, the New York and Delaware legislatures are considering bills which would create administered dispute resolution programs with slightly varying characteristics.

The New Jersey Act

The Health Claims Authorization, Processing and Payment Act implements a two-step dispute resolution process:

1) Providers can initiate an internal appeal administered by the payer at no cost to the provider within 90 days of claim determination. The payer has 30 days to respond, and the decision is binding on the payer, but not on the provider.

2) If providers receive an adverse decision, or no decision within 30 days, they may initiate administered binding arbitration within 90 days. Arbitrated claim amounts must be at least $1000, but providers may aggregate multiple individual payment claims to reach the threshold. The arbitrator must issue a reasoned award within 30 days of receiving the required documentation. The arbitration decision is nonappealable and binding on all parties.

Pending Legislation

The New York Legislature is considering companion bills, S07569 and A10597, which would require the Superintendent of the State Insurance Department "to establish an independent dispute resolution review board…to hear and resolve insurer and health care provider billing disputes…."

Review board members are required to be unbiased and have the "requisite knowledge and expertise to determine and arbitrate such billing disputes."

The Superintendent would establish a "case administration fee" to cover the costs incurred by the board, and the non-prevailing party would be responsible for paying the fee.

The Delaware House is considering HB438, a bill that would create a "low-cost arbitration process" for health care providers to resolve payment disputes with insurance companies. As written, the Department of Insurance would administer the program using a panel of arbitrators to hear disputes.

The fee for the arbitration would not exceed $100. Insurers would be able to opt out of the new regulation by maintaining their own "substantially similar" program.

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Conclusion

New Jersey's new Health Claims Act funnels payment claims disputes into a dispute resolution regime that includes binding arbitration administered by a neutral third-party. The proposed New York and Delaware systems have similar goals, but appear to be more directly administered by the state insurance departments.

Did You Know?

The Federal Arbitration Act (FAA):

- governs a vast collection of arbitration agreements in contracts "involving commerce,"[1]
- applies to contracts fitting within the "broadest permissible exercise"[2] of Congress' Commerce Clause Power, and
- creates a federal law duty to enforce arbitration agreements and confirm arbitration awards as written.

However, the FAA does not, in itself, create federal question jurisdiction allowing parties to compel arbitration or confirm awards in federal court. In this regard, it is "something of an anomaly in the field of federal-court jurisdiction."[3] Instead, the transaction underlying the arbitration agreement or award must independently qualify for federal subject matter jurisdiction, either on diversity or federal question grounds, for an action to be heard in federal court.

The rights conferred by the FAA are fully enforceable in state as well as federal court.[4]

[1] 9 U.S.C. § 2.
[2] *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56 (2003).
[3] *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 26, n.32 (1983).
[4] Id. at 24.

Supreme Court Reaffirms Two Key Arbitration Holdings

Whether brought in federal or state court, a challenge to the validity of a contract as a whole, rather than to just the arbitration clause, must be referred to arbitration, according to the Supreme Court of the United States.

In ***Buckeye Check Cashing, Inc. v. Cardegna,*** No. 04-1264 (Feb. 21, 2006), Cardegna brought a putative class action alleging that Buckeye charged usurious interest rates in connection with check cashing loans, and that Buckeye's loan agreements violated Florida lending and consumer protection laws.

Buckeye moved to compel arbitration based upon the arbitration clause contained in the loan agreements. Cardegna argued that the entire contract was void for illegality and that the arbitration clause was therefore also void.

The Florida Supreme Court sided with Cardegna, holding that enforcing agreements to arbitrate in a contract challenged as unlawful "could breathe life into a contract that not only violates state law, but also is criminal in nature."

The Supreme Court of the United States reversed, holding that Cardegna's challenge to the contract "must go to the arbitrator." Writing for a seven justice majority, Justice Scalia reaffirmed ***Prima Paint Corp. v. Flood & Conklin Mfg. Co.,*** 388 U.S. 395 (1967) and ***Southland Corp. v. Keating,*** 465 U. S. 1, 12 (1984), noting that these decisions established three propositions.

First, an arbitration provision is severable from the rest of the contract. Second, unless the arbitration clause itself is challenged, the validity of a contract is for the arbitrator to decide. And finally, substantive federal arbitration law applies in both state and federal courts. ***Southland Corp. v. Keating,*** 465 U. S. 1, 12 (1984).

Scalia rejected the Florida court's distinction between void and voidable contracts. Under Florida law, parts of a contract cannot be severed from a void contract. But the Supreme Court concluded that, because ***Prima Paint*** rejected the application of state severability rules to arbitration agreements, Florida state law is irrelevant.

The Court distinguished contract validity challenges, which are now clearly reserved for the arbitrator, from arguments that the agreement was never concluded. Only the latter are the types of "gateway" issues appropriate for judicial determination. Justice Scalia listed lack of a contract signature, insufficient agent authority to bind a principal, and signor mental capacity as examples.

In this way, ***Buckeye*** replaces a murky arbitrability doctrine, potentially reliant on relatively arbitrary distinctions from contract validity law, with a bright-line test based upon contract formation. After ***Buckeye,*** validity questions go to arbitration, and formation questions are for the court.

In addition to reaffirming the core arbitration holdings in ***Prima Paint*** and ***Southland,*** the case should also be seen as a continuation of the recent Supreme Court trend of respecting and expanding arbitrator authority.

PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003) held that arbitrators, rather than courts, have the power to determine the meaning of contractual damages provisions. ***Green Tree Financial Corp. v. Bazzle,*** 539 U.S. 444 (2003) emphasized that matters of contract interpretation "should be for the arbitrator, not the courts, to decide."

Reading ***Buckeye*** in this context further strengthens its message: whether heard in state or federal court, challenges to a contract's validity must go to the arbitrator.

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California Court Upholds Arbitrator's Award Despite Excluded Evidence

Without considering the materiality of excluded evidence, a California appellate court refused to vacate an arbitrator's award for refusal to admit the evidence because the refusal did not prejudice the award.

In ***Kaiser Foundation Health Plan, Inc. v. Ayon-Alexandre,*** No. H028061 (Cal. Ct. App. Mar. 7, 2006), Ayon-Alexandre sued Kaiser for allegedly failing to properly diagnose her ectopic pregnancy. At issue was whether inappropriate advice received from a telephonic nurse led to a delay in treatment that caused the injury. The parties arbitrated the matter and the arbitrator denied Ayon-Alexandre any damages.

Ayon-Alexandre moved to vacate, claiming that her rights were substantially prejudiced by the arbitrator's refusal to hear material evidence. Under California law, an arbitrator's refusal to hear material evidence is a statutory basis for vacating an award. See Cal. Code Civ. Proc §1286.2 subd. (a)(5).

Upon review, the court cautioned that it must avoid examining the merits of the arbitrator's evidentiary rulings. Ordinarily, courts reviewing the exclusion of evidence first decide the materiality of the evidence, and then focus on substantial prejudice. But where examining materiality might require the second-guessing of an arbitrator's legal theory, the court determined it must first focus on prejudice.

The court accepted the arbitrator's legal theory for purposes of analysis and then considered whether the arbitrator might have issued a different award had the evidence been allowed. In this case, the court found that the award would have remained the same.

According to the court, the arbitrator determined that the issue in the case was whether the telephonic advice was consistent with the standard of care. The court then concluded that none of the evidence excluded would have affected the arbitrator's decision on this issue.

The opinion carefully lays out how a court can consider a challenge for failure to hear material evidence without second-guessing the merits. The court's approach preserves the legislative goal of arbitral finality while enabling courts to give meaningful consideration to these types of challenges.

Healthcare ADR Legislative Activity

Delaware HB438
(Introduced 05/23/2006)
Reported out of the Economic Development/Banking & Insurance Committee
Subjects: Arbitration; Health Insurance Prompt Pay Disputes
(see summary in this issue's lead story)

Louisiana SB 206
(Introduced 3/16/06)
Signed by Governor 05/16/2006
Subject: Mediation; Workers' Compensation
Amends current statute providing for jurisdiction and procedures in a disputed workers compensation claim and amends process for mediation.

New York SB7569
(Introduced 04/25/2006)
Referred to Insurance Committee
Subjects: Arbitration; Health Insurance Prompt Pay Disputes
(see summary in this issue's lead story)

New York SB7788
(Introduced 04/26/2006)
Referred to Labor Committee
Subjects: Arbitration; Massage Therapy; Workers' Compensation
Amends existing workers' compensation law to include massage therapists. Adds arbitration of disputes over value of massage therapy services. Disputes will be arbitrated by a panel consisting of one massage therapist representative, one physician designated by the employer or carrier, and one physician designated by the chair of the workers' compensation board.

New York SB7810/AB8764
(Introduced 04/26/2006)
Referred to Labor Committee
Subjects: Arbitration; Workers' Compensation
Enacts the "Workers' Compensation and Benefits Improvement Act." Amends the workers' compensation law. Current law has a scheme in place for disputes, over the value of services rendered, to be heard by a state-appointed panel of physician-arbitrators. The statute would be amended to establish a $500 minimum limit for arbitrations to be heard. Disputes over bills of $500 or less will be heard separately by an individual physician appointed to hear such disputes.

South Carolina SB3700
(Introduced 3/3/2005)
Signed by Governor 6/9/2006
Subjects: ADR; Medical Malpractice
Section 15-79-120 of the 1976 Code is amended to read: "At any time before a medical malpractice action is brought to trial, the parties shall participate in mediation governed by procedures established in the South Carolina Circuit Court Alternative Dispute Resolution Rules in effect at the time for the State or any portion of the State. Parties may also agree to participate in binding arbitration, non-binding arbitration, early neutral evaluation, or other forms of alternative dispute resolution."

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Electronic Agreement Must Be Available

A California Court of Appeal refused to compel a consumer to arbitrate because she had no opportunity to see or approve of the terms of a health insurance policy she purchased.

In ***Wilhelmi v. Health Net Life Insurance Co.,*** No. B180232 (Cal. Ct. App. June 7, 2006), Wilhelmi never saw an insurance application because her agent completed it by asking relevant questions and entering her responses into the computer. Wilhelmi never signed the application because, according to her agent, it would not print.

Health Net approved the unsigned application and issued a policy. Later, Wilhelmi received medical treatment for which Health Net refused to pay on the ground that she failed to disclose prior surgery. Wilhelmi sued and Health Net moved to compel arbitration pursuant to an arbitration provision in the policy.

Noting that Wilhelmi "cannot outwardly manifest assent to a provision she does not know exists," the court denied Health Net's motion, finding that there was no written agreement to arbitrate.

California law requires that an agreement to arbitrate be written. Here, Wilhelmi never saw the terms and never received a written agreement. Health Net argued that California law links voluntary acceptance of a benefit with "consent to all the obligations arising from it."

The court concluded that this principle only applied to obligations that are known, or ought to be known, to the person accepting.

NATIONAL ARBITRATION FORUM

The National Arbitration Forum is a leading provider of dispute resolution services, with over 1,500 legally-trained mediators and arbitrators located in 50 states and 29 countries. We offer the full range of healthcare dispute resolution services, including arbitrations resulting from predispute agreements between patients/enrollees and healthcare providers and plans, medical disclosure/ "I'm Sorry" programs, and arbitration and mediation of contractual disputes between providers, plans, and payers.

To receive the complimentary White Paper, *Mediating and Arbitrating Healthcare Disputes,* which includes drafting tips and model ADR language, or for expert information on how to implement a healthcare ADR program, contact us at 877-655-7755, or healthcare@arb-forum.com.

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